

SUMMONS IN A CIVIL ACTION COURT OF COMMON PLEAS, CUYAHOGA COUNTY JUSTICE CENTER
CLEVELAND, OHIO 44113

CASE NO.
CV12782910

D1 CM

SUMMONS NO.
19438044

Rule 4 (B) Ohio

Rules of Civil
Procedure

CITY OF WESTLAKE OHIO
VS

PLAINTIFF

CITY OF CLEVELAND OHIO

DEFENDANT

SUMMONS

CITY OF CLEVELAND OHIO
ATTN: FRANK JACKSON MAYOR
AN OHIO MUNICIPAL CORPORATION
601 LAKESIDE AVENUE

CLEVELAND OH 44114-0000

Said answer is required to be served on:

Plaintiff's Attorney

JOHN D WHEELER
27700 HILLIARD BOULEVARD
WESTLAKE, OH 44145-0800

Case has been assigned to Judge:

MICHAEL ASTRAB
Do not contact Judge. Judge's name is given for
attorney's reference only.

DATE

May 25, 2012

GERALD E. FUERST
Clerk of the Court of Common Pleas

By

Deputy



COMPLAINT FILED 05/18/2012



IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

CITY OF WESTLAKE, OHIO,
An Ohio Municipal Corporation
27700 Hilliard Boulevard
Westlake, Ohio 44145

Plaintiff,

vs.

CITY OF CLEVELAND, OHIO,
Attn: Frank Jackson, Mayor
An Ohio Municipal Corporation
601 Lakeside Avenue
Cleveland, Ohio 44114

Defendant.

Judge: MICHAEL ASTRAB

CV 12 782910

**COMPLAINT FOR DECLARATORY JUDGMENT
AND INJUNCTIVE RELIEF**

PARTIES

1. Plaintiff City of Westlake, Ohio ("Westlake") is a duly organized and existing Ohio municipal corporation conducting its activities pursuant to a City Charter first adopted on November 6, 1956 and thereafter amended.
2. Defendant City of Cleveland, Ohio ("Cleveland") is also a duly organized and existing Ohio municipal corporation.

BACKGROUND

3. Prior to March 15, 1990, representatives of Westlake and Cleveland began negotiating an agreement between the two municipalities by the terms of which Cleveland would provide potable water and related services to Westlake and its inhabitants.

4. These discussions resulted in a proposed "Water Service Agreement for Direct Service" between Westlake and Cleveland.

5. The proposed agreement provided in Article 5 that "[Westlake] agrees that [Cleveland] shall be the sole and *exclusive* supplier of water to [Westlake] and its inhabitants for the term of this AGREEMENT." (Emphasis added).

6. The proposed agreement also provided that Cleveland would bill Westlake's residents directly for water usage.

7. The proposed agreement in Article 23 contained the following provision concerning its term and notice of termination:

The term of this AGREEMENT shall be for a minimum period of ten (10) years commencing on the first day after execution of this AGREEMENT by [Cleveland], and shall automatically continue in effect from year to year thereafter. *This AGREEMENT may be cancelled by either party hereto by giving written notice to the other party at least five (5) years prior to the effective date of termination, provided that no such notice may be given until five (5) years after the date upon which this AGREEMENT is executed by [Cleveland].* Any notice of cancellation shall be by certified mail, return receipt requested, addressed to the Director [of the Department of Public Utilities of the City of Cleveland] in case of [Cleveland] or the highest ranking official in case of [Westlake]. In the event of termination of this AGREEMENT, following notice of cancellation by either party, the Director or his designated representative shall have sole control over the terms and conditions of the operation of the water system within [Westlake's] geographic territory, so long as water is being supplied by [Cleveland] to said territory. (Emphasis added).

8. Article XI, Section 5 of Westlake's Charter contains the following provision regarding the operation of utility franchises within the municipality:

The Council may by ordinance grant a *nonexclusive franchise* to any person, firm or corporation to construct or operate a public utility on, across, under, over or above any public street or real estate within the Municipality *for a period not in excess of twenty-five (25) years*; and it may prescribe in the ordinance the kind or quality of service or product to be furnished, the rate or rates to be charged therefor, and such other terms as Council shall deem conducive to the public interest. Such franchise may be amended or renewed in the manner and subject to the provisions established by this Charter for original grants. No consent of the owner of property abutting on any public street or real estate shall be necessary to the effectiveness of any such grant, amendment or renewal. (Emphasis added).

All such grants, amendments and renewals shall be made subject to the continuing right of the Council to provide reasonable regulations for the operation of such utilities with reference to streets and public real estate, including the right to require such reconstruction, relocation, alteration or removal of structures and equipment used in such streets or public realty as shall, in the opinion of Council, be necessary in the public interest.

9. On February 15, 1990, Westlake passed an ordinance authorizing the Mayor to enter into the Water Service Agreement with Cleveland which was attached to the ordinance. The ordinance further provided, as a limitation to the authority granted to the Mayor, "that the terms and conditions of the Agreement do not conflict with any provision of the Charter of the City of Westlake."

10. Consistent with the Charter the ordinance specifically granted to Cleveland "a *non-exclusive franchise* to construct and operate a public utility for the furnishing to the City of Westlake and its inhabitants potable water *for a period of twenty-five years*." (Emphasis added).

11. The ordinance was signed by the Mayor of Westlake on February 16, 1990. A copy of the executed ordinance is attached hereto as Exhibit A.

12. On March 19, 1990, Cleveland entered into a Water Service Agreement for Direct Service (the "WSA") which was identical to the agreement attached to the ordinance adopted by the Council for the City of Westlake on February 15, 1990, a copy of which is attached hereto as Exhibit B.

13. The Mayor of Westlake signed the WSA pursuant to the authority granted in the ordinance on or about March 19, 1990 as indicated in the MOU.

14. On March 19, 1990 Westlake and Cleveland also entered into a Memorandum of Understanding ("MOU") which provided as follows:

Article 5 of the Contract provides that Cleveland will be the sole and exclusive supplier of water to Westlake. Cleveland and Westlake agree that the language of Article 5 of the Contract is not intended to grant an exclusive franchise to provide water service to Westlake and its inhabitants in violation of Westlake's Charter which prohibits the granting of an exclusive franchise for utility service to any utility company.

Westlake acknowledges that, as of the date of the Contract, Cleveland has been and will continue to be the sole supplier of water to Westlake and its inhabitants during the term of the Contract because there are no alternative sources of water supply to the community.

However, in the event that the second sentence of Article 5 of the Contract is construed to be invalid, illegal or unenforceable, pursuant to paragraph 26.03 of the Contract, such invalidity shall not affect any other term or provisions of the Contract, and the Contract shall be interpreted and construed as if the sentence had never been contained therein.

A copy of the MOU is attached hereto as Exhibit C.

15. Pursuant to the WSA and the MOU, Cleveland has been providing potable water to Westlake and its inhabitants on an exclusive basis because there has been no alternative source.

16. Westlake is considering the purchase of potable water from the City of Avon Lake and preliminary engineering studies indicate that significant cost savings would result to Westlake and its inhabitants from obtaining potable water from this secondary source.

17. Aware of Westlake's discussions with Avon Lake, the Office of the Mayor of Cleveland sent a letter to the Mayor of Westlake on December 14, 2011 emphasizing that the WSA requires a five (5) year notice of termination, and threatened to recover "stranded costs" in the estimated amount of \$39,000,000 and other expenses estimated to be an additional \$17,000,000 "to mitigate reliability impacts on Westlake's neighbors" by adjusting customer rates during the notice period. A copy of the letter is attached hereto as Exhibit D¹.

18. Westlake has not provided Cleveland with a notice of cancellation pursuant to Article 23 of the WSA.

COUNT ONE - DECLARATORY JUDGMENT

19. Westlake incorporates all preceding allegations as if fully restated herein.

20. Since Cleveland bills Westlake's residents directly, Cleveland's proposed unilateral actions as described in its December 14, 2011 letter present a case or controversy ripe for adjudication.

21. This Court has jurisdiction to determine any question of construction or validity arising under a contract and to declare the rights, status, or other legal relations under it pursuant to R.C. § 2721.03

22. Westlake seeks a declaration of its rights and obligations under the WSA and MOU, specifically whether:

- a. Whether Westlake may obtain a secondary source of potable water without being in breach of the WSA;

¹ Exhibit D is only the December 14, 2011 letter from Darrell Brown, Chief Operating Officer for the City of Cleveland. It does not contain the exhibits referenced in the letter.

- b. Whether Westlake is obligated to purchase all of its required potable water from Cleveland during the five-year notice period contained in Article 23 of the WSA;
- c. Whether the WSA's provision automatically extending the term of the WSA following the first ten (10) year term to perpetual annual terms, but requiring a five (5) year notice period contained in Article 23 of the WSA is enforceable;
- d. Whether the WSA is unenforceable beyond twenty-five (25) years from its effective date; and
- e. Whether Cleveland may recover "stranded costs" or other additional costs to "mitigate reliability impacts" on neighbors as described in Cleveland's December 14, 2011 letter by unilaterally adjusting customer rates during the notice period.

COUNT TWO - INJUNCTIVE RELIEF

- 23. Westlake incorporates all preceding allegations as if fully restated herein.
- 24. Westlake and its inhabitants will suffer immediate and irreparable harm if Cleveland undertakes actions to recover its alleged "stranded costs" and to "mitigate reliability impacts on Westlake's neighbors" by increasing charges for potable water and water related services to consumers in Westlake.
- 25. Westlake is entitled to preliminary and permanent injunctive relief to enjoin Cleveland from taking such actions.

WHEREFORE, as to Count One, Westlake requests judgment as follows:

- A. The Court declare its rights and obligations under the WSA, including its rights and obligations in the following specific respects:
 - 1. That Westlake has the right to obtain a secondary source of potable water without being in breach of the WSA;
 - 2. That the WSA does not require the purchase of any definable amount of water during the five-year notice period contained in Article 23 of the WSA;

3. That the WSA's provision automatically extending the term of the WSA following the first ten (10) year term to perpetual annual terms, but requiring a five (5) year notice to terminate is unenforceable;
4. That the WSA is unenforceable beyond twenty-five (25) years from its effective date; and
5. That Cleveland may not recover "stranded costs" or other additional costs to "mitigate reliability impacts" on neighbors by unilaterally adjusting customer rates during the notice period as described in Cleveland's December 14, 2011 letter.

B. As to Count Two, Westlake requests that this Court grant a preliminary and permanent injunction enjoining Cleveland from the following actions:

1. Increasing its water rates in order to recover "stranded costs" or other additional costs to "mitigate reliability impacts" as described in Cleveland's December 14, 2011 letter;
2. Taking any action detrimental to the interests of the consumers of water within Westlake, which are inconsistent with the obligations of Cleveland under the WSA.

C. Such other relief as the Court may deem equitable and just.

Respectfully submitted,

STUMPHAUZER, O'TOOLE, McLAUGHLIN,
McGLAMERY & LOUGHMAN CO., LPA

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Attorneys for Plaintiff City of Westlake

INSTRUCTIONS TO THE CLERK:

Please serve a copy of the Summons and this Complaint for Declaratory Judgment and Injunctive Relief upon the Defendant via first class certified mail at the address indicated in the caption.



Dennis M. O'Toole

One of the Attorneys for Plaintiff, City of Westlake

CITY OF WESTLAKE, OHIO
ORDINANCE NO. 1989-7

AN ORDINANCE AUTHORIZING THE MAYOR TO ENTER
INTO A WATER SERVICE AGREEMENT FOR DIRECT
SERVICE WITH THE CITY OF CLEVELAND.

WHEREAS, the City of Cleveland, by virtue of its Charter and the Constitution of the State of Ohio, is empowered to sell and deliver its surplus water to inhabitants and others outside of its municipal boundaries, and

WHEREAS, the City of Westlake desires to enter into an Agreement with the City of Cleveland to continue to obtain potable water for itself and its inhabitants.

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF WESTLAKE, COUNTY OF CUYAHOGA AND STATE OF OHIO:

SECTION 1: That the Mayor be and he is hereby authorized to enter into a Water Service Agreement for direct service for furnishing to the City of Westlake and its inhabitants potable water, which said Agreement is attached hereto and made a part hereof as though fully rewritten herein and marked Exhibit "A", and further provided that the terms and conditions of the Agreement do not conflict with any provision of the Charter of the City of Westlake.

SECTION 2: That a duly authenticated copy of the Water Service Agreement shall be kept in the Clerk of Council's Office and the Department of Engineering.

SECTION 3: That this Council grants to the City of Cleveland, pursuant to Article XI, Section 5, a non-exclusive franchise to construct and operate a public utility for the furnishing to the City of Westlake and its inhabitants potable water for a period of twenty-five (25) years.

SECTION 4: That it is found and determined that all formal actions of this Council concerning and relating to the adoption of this ordinance were adopted in an open meeting of this Council and that all deliberations of this Council and of any of its committees that resulted in such formal action were in meetings open to the public in compliance with all legal requirements including Section 121.22 of the Ohio Revised Code.

SECTION 5: That this Ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed: 2-15-90

Robert M. Peterson
Robert M. Peterson
President of Council

Presented to Mayor: 2-16-90

Approved: 2-16-90

ATTEST:

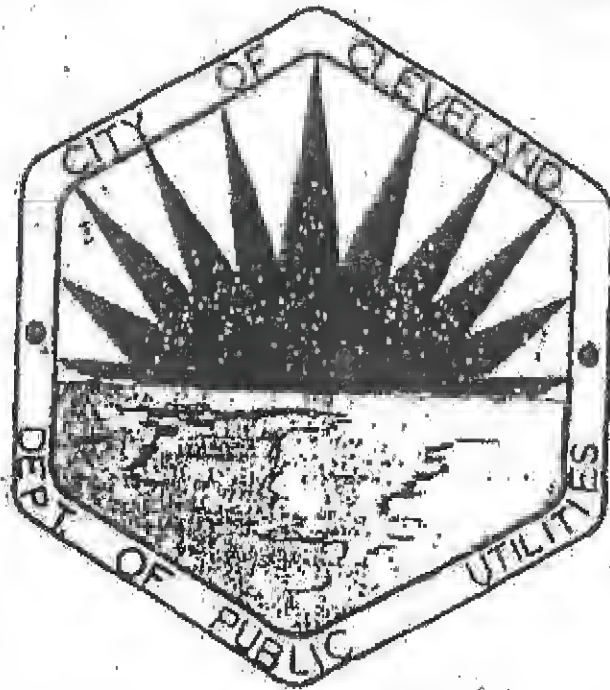
Nora T. Hill
Nora T. Hill, Clerk of Council

Dennis M. Clough
Dennis M. Clough, Mayor

EXHIBIT A

R.T.O. 24 90

CITY OF CLEVELAND
DUPLICATE ORIGINAL



WATER SERVICE
AGREEMENT

with

City of Westlake

EXHIBIT B

WATER SERVICE AGREEMENT FOR DIRECT SERVICE

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WATER SERVICE AGREEMENT FOR DIRECT SERVICE

THIS AGREEMENT is made and entered into this _____ day of _____ by and between the CITY OF CLEVELAND ("PURVEYOR") acting by and through its Mayor by authority of Section 129.16 of the Codified Ordinances of the City of Cleveland, and the CITY OF WESTLAKE ("MUNICIPALITY") acting by authority of Ordinance No. _____, passed on _____, 19____.

WHEREAS, PURVEYOR owns and operates a waterworks system under the management and control of its Division of Water and Heat, Department of Public Utilities, pursuant to the Constitution and laws of the State of Ohio and the Charter and ordinances of the City of Cleveland; and

WHEREAS, PURVEYOR under authority of the Charter of the City of Cleveland and Article XVIII, Section 6, of the Ohio Constitution is empowered to sell and deliver its surplus water to inhabitants and others outside its municipal boundaries; and

WHEREAS, MUNICIPALITY seeks to represent itself and its inhabitants to PURVEYOR for itself and its inhabitants; and

WHEREAS, PURVEYOR has been the sole supplier of water to MUNICIPALITY; and

WHEREAS, MUNICIPALITY will continue to utilize PURVEYOR to provide water to MUNICIPALITY and its inhabitants and is willing to contract with PURVEYOR as the sole and exclusive supplier of water for itself and its inhabitants on the terms, covenants, and conditions

and

WHEREAS, PURVEYOR is willing to continue to provide water and water related services to MUNICIPALITY and its inhabitants on the terms, covenants, and conditions hereinafter set forth;

NOW, THEREFORE, for the reasons set forth above, and in consideration of the mutual promises and agreements hereinafter set forth, PURVEYOR and MUNICIPALITY agree as follows:

ARTICLE I. DEFINITIONS

- 1.01 "Director" means the Director of the Department of Public Utilities of the City of Cleveland.
- 1.02 "Division of Water" means the Division of Water and Heat of the Department of Public Utilities of the City of Cleveland.
- 1.03 "Commissioner" means the Commissioner of the Division of Water and Heat of the Department of Public Utilities.
- 1.04 "Waterworks Facilities" means all waterworks facilities including but not limited to water treatment facilities, storage facilities, and pumping stations but excluding water mains.
- 1.05 "Water Main" means any pipe, regardless of size or function, which is used to transport water from Lake Erie as part of PURVEYOR'S waterworks system to any service connection.
- 1.06 "Trunk Main" means a water main that is twenty inches (20") in diameter or larger.
- 1.07 "Distribution Main" means a water main that is less than twenty inches (20") in diameter.
- 1.08 "Service Connection" means any tap or connection to a distribution main to enable the furnishing of water from such distribution main to any water consumer.
- 1.09 "Direct Service Customer" means an owner of premises located outside PURVEYOR'S municipal boundaries who receives water and water related services from PURVEYOR and who is billed by and pays to PURVEYOR directly for such water and water services.

1.10 "Master Meter Customer" means a governmental entity which purchases water from PURVEYOR for resale and delivery to water consumers.

1.11 "Suburban Water Council of Governments" means a council of governments formed pursuant to Chapter 167 of the Ohio Revised Code whose membership is limited to and open to those political subdivisions who receive water and/or water related services or whose inhabitants receive water and/or water related services from PURVEYOR.

ARTICLE 2. SERVICE DISTRICTS

2.01 PURVEYOR has divided the geographic area in which it supplies water into service districts, designated Low, First High, Second High and Third High. It is agreed that the service districts located within the territorial boundaries of MUNICIPALITY are as set forth in the Map which is attached hereto as Exhibit A. Only for the purpose of preserving the hydraulic integrity of the system, PURVEYOR may change the service district and the consequent rate to be applied to any geographic territory located within MUNICIPALITY upon sixty (60) days written notice to MUNICIPALITY from PURVEYOR'S engineer describing the engineering changes actually made in the grid system.

ARTICLE 3. OBLIGATION TO FURNISH QUALITY WATER

3.01 In accordance with and subject to the terms of this AGREEMENT, PURVEYOR agrees to continue to furnish water and water related services to MUNICIPALITY and its inhabitants, including persons, commercial businesses, industry, and other existing direct service customers. PURVEYOR has the right to prohibit the installation or extension of any water mains only when the Commissioner determines, on the basis of engineering data, that the installation or extension would adversely affect water pressure and/or water volume being provided to PURVEYOR'S existing water consumers or in accordance with Article 10, Section 10.04(b) hereof.

3.02 The water furnished by PURVEYOR shall at all times be at least equal to the quality of water that is furnished by PURVEYOR to water consumers located within the territorial boundaries of the City of Cleveland.

3.03 PURVEYOR does not guarantee any fixed volume or pressure of water, the same being subject to varying conditions of tuberculation of water mains and other conditions relating to the operation and maintenance of PURVEYOR'S waterworks system. However, MUNICIPALITY shall have a cause of action against PURVEYOR if any such condition arises as the direct result of PURVEYOR'S breach of any term of this AGREEMENT. When necessitated by the need to repair breaks in water mains, serious damage to reservoirs, serious damage to pumping machinery or other emergencies, water may be shut off or curtailed without notice and the failure to furnish water under such circumstances shall in no case render PURVEYOR liable in damages. However, as soon as reasonably possible, the Mayor and/or Service or Safety Director of MUNICIPALITY will be notified, so that fire protection precautions may be taken.

3.04 PURVEYOR shall have the right to discontinue serving any Direct Service Customer who fails to pay in full within the period of time set by PURVEYOR any water bill or who violates any of the provisions of this AGREEMENT or any ordinances, rules or regulations of PURVEYOR that are applicable to the supplying of water to him by PURVEYOR. The same right to discontinue service shall apply to service to MUNICIPALITY except that service may be discontinued only if such violation or failure to pay continues for four (4) months after written notice is given by PURVEYOR of the alleged violation or failure to pay.

ARTICLE 4. WATER RATES

4.01 Rates charged to all customers of PURVEYOR shall be set by the Board of Control of the City of Cleveland subject only to the approval of its Council. PURVEYOR hereby agrees that, for a period of ten (10) years from and after the effective date of this AGREEMENT, the dollar amount of any and all increases in water rates charged by the City of Cleveland to any Direct Service Customer shall not exceed the dollar amount of the increase for any direct service customer within the City of Cleveland by more than 75% in the Low or First High Service District outside the City of Cleveland; by more than 100% in the Second High Service District outside the City of Cleveland; or by more than 130% in the Third High Service District outside the City of Cleveland. Rates shall be calculated on a dollars per one thousand cubic feet of water basis. Rate increases for Master Meter Customers shall be 75% of the rate increases for Direct Service Customers located in comparable service districts and 60% of the first rate increase reflecting the elimination of a separate maintenance charge. No increase shall be made in the rate for any customer without simultaneously increasing the rates for all other customers, except that customers entitled to a Homestead Exemption as presently specified and defined by the Codified Ordinances of the City of Cleveland need not be increased.

4.02 Rate increases for the following classes of customers shall not be limited by the provisions of Paragraph 4.01 above:

- 1) The rate to be charged to all customers or classes of customers who have taken steps toward leaving the Cleveland water system;
- 2) All rates and charges for unmetered fire supply connections pursuant to Section 535.21 of the Codified Ordinances of the City of Cleveland;
- 3) All rates and charges for water supplied from a public fire hydrant set pursuant to Article 17 hereof; and
- 4) All special rates for the use of water under special circumstances as determined by the Commissioner of Water pursuant to Section No. 535.26 of the Codified Ordinances of the City of Cleveland.

4.03 PURVEYOR agrees that no water rate shall be changed, instituted or revoked prior to sixty (60) days after the Suburban Water Council of Governments receives written notice of the proposed change, institution or revocation.

ARTICLE 5. COVENANT NOT TO SUE ON WATER RATES; EXCLUSIVE FRANCHISE

5.01 In consideration of the agreement of PURVEYOR and provided that PURVEYOR conforms all water rate increases strictly to the provisions of Article 4 of this AGREEMENT, and in consideration of the agreement of PURVEYOR to finance and construct the capital improvements provided for in Article 20 of this AGREEMENT, MUNICIPALITY agrees that it will not directly or indirectly, alone or together with others, by court proceedings or in any other way attempt to obstruct, enjoin, hinder or disable PURVEYOR from setting, charging, and collecting rates that PURVEYOR in its sole discretion deems necessary to enable PURVEYOR to fulfill its obligations hereunder. In addition, MUNICIPALITY agrees that PURVEYOR shall be the sole and exclusive supplier of water to MUNICIPALITY and its inhabitants for the term of this AGREEMENT.

ARTICLE 6. OPERATIONAL CONTROL OF WATERWORKS SYSTEM

6.01 PURVEYOR has the right to regulate and control, in accordance with the terms and conditions of this AGREEMENT, the operation, engineering, construction, expansion, maintenance, repair and use of the entire waterworks system, including all water treatment facilities, water storage facilities, pumping stations, water transmission facilities, and water mains. The Commissioner has the right to determine through which water mains, water shall be delivered to any Direct Service Customer of PURVEYOR.

ARTICLE 7. RIGHT TO USE STREETS, WATER MAINS, AND EQUIPMENT

7.01 PURVEYOR shall have the right to use the easements, streets, and other public ways and places of MUNICIPALITY to the extent MUNICIPALITY has such rights, for the purpose of laying, extending, maintaining and repairing water mains and doing such other acts as PURVEYOR shall deem to be necessary for the delivery of water to all of PURVEYOR'S present and potential consumers, whether located inside or outside of the territorial boundaries of MUNICIPALITY.

7.02 PURVEYOR shall have the right to use, extend, tap or connect into any and all water mains and other water transmission facilities, irrespective of whether or not they are owned or controlled by MUNICIPALITY, without any fee or charges by MUNICIPALITY to PURVEYOR for the exercise of such right, provided such water mains and/or other water transmission facilities are connected into PURVEYOR'S waterworks system.

7.03 The surface easements and streets shall be restored to previous condition (after laying, extending, repairing and maintaining water mains) by MUNICIPALITY at PURVEYOR'S expense unless otherwise agreed to in writing by MUNICIPALITY and PURVEYOR.

ARTICLE 8. INSTALLATION AND MAINTENANCE OF WATER FACILITIES

8.01 PURVEYOR shall have the obligation to provide, at its own cost and expense, the planning, engineering, purchasing, construction, installation, Waterworks Facilities that PURVEYOR in its sole discretion deems necessary or conducive to the proper and efficient functioning of the waterworks system, unless otherwise provided in this AGREEMENT.

8.02 When, in the opinion of the Commissioner, additional Waterworks Facilities need to be installed within the corporate limits of MUNICIPALITY, MUNICIPALITY shall cooperate with PURVEYOR in the construction or installation of such facilities to the extent such cooperation shall not impose any additional cost to MUNICIPALITY, unless otherwise provided in this AGREEMENT, and PURVEYOR shall provide MUNICIPALITY with due notice as to the location of the proposed Waterworks Facilities. MUNICIPALITY shall not charge PURVEYOR for any permits in connection with such installation, and MUNICIPALITY shall cooperate in providing all permits, easements, rights-of-way, access, traffic control and other rights and privileges necessary to facilitate PURVEYOR'S work. PURVEYOR shall pay for the restoration of areas in which construction is carried on, shall pay for any property taken for such construction, and to the extent allowed by law, hold MUNICIPALITY harmless from all damages or claims for damages to persons or property arising from the performance by PURVEYOR or its agents of any work to install or repair or maintain Waterwork Facilities, unless otherwise provided in this AGREEMENT. MUNICIPALITY reserves the right to require its own inspectors where it deems necessary on work performed within its boundaries. The cost of any such inspections shall be paid by MUNICIPALITY. However, where construction of new, extension or replacement Waterworks Facilities is being carried out at the request of PURVEYOR and not at the request of MUNICIPALITY, and where MUNICIPALITY'S inspection is not routine, then the cost of such inspection shall be paid by PURVEYOR.

ARTICLE 9. INSTALLATION AND MAINTENANCE OF TRUNK MAINS

9.01 PURVEYOR shall have the right to use and shall bear the expense of repairing, maintaining, cleaning and relining all trunk mains located within MUNICIPALITY'S corporate limits. PURVEYOR shall further have the right to use and shall bear the expense of repairing, maintaining, cleaning and relining the water main identified on Exhibit A, which are defined as distribution mains but have been deemed by PURVEYOR to be functioning as trunk mains. PURVEYOR shall not bear the expense of cleaning and relining any mains not herein expressly identified. A priority shall be established for cleaning and relining

those mains listed on Exhibit B based primarily upon the Hazen-Williams "C" Coefficient of the interior of such mains. The mains having the lowest Hazen-Williams "C" Coefficient values, taking into consideration the demand on the system, shall be considered for cleaning and relining at the earliest possible time.

9.02 When in the opinion of the Commissioner, additional trunk mains or extensions of trunk mains shall be installed to supply MUNICIPALITY or any territory beyond MUNICIPALITY'S corporate limits, such mains or extensions thereof shall be installed, repaired, maintained, cleaned, and relined by PURVEYOR at its expense. PURVEYOR is hereby authorized to install new trunk mains within the corporate limits of MUNICIPALITY after due notice to MUNICIPALITY as to the location of the proposed mains or extensions thereof. MUNICIPALITY shall not charge PURVEYOR for any permits or inspection fees in connection with such installation and MUNICIPALITY shall cooperate in providing all permits, easements, rights-of-way, access, traffic control and other rights and privileges necessary to facilitate PURVEYOR'S work. PURVEYOR shall pay for the restoration of areas in which construction is carried on and shall, to the extent allowed by law, save the MUNICIPALITY harmless from all damages or claims for damages to persons or property arising from the performance by PURVEYOR or its agents of any work to repair, maintain, or install trunk mains.

9.03 When the purpose in performing any of the work referred to in this Article 9 is, in the opinion of the Commissioner, primarily to provide additional water supply to MUNICIPALITY and its inhabitants, and such water is requested by the MUNICIPALITY, and if it is necessary to remove or rearrange the property of any other utility to perform such work, the MUNICIPALITY shall remove or rearrange or cause to be removed or rearranged, at no expense to PURVEYOR, the property of the other utility. If, however, the work performed is, in the opinion of the Commissioner, not primarily to provide additional supply to MUNICIPALITY, or its inhabitants, and the work is not requested by the MUNICIPALITY, and it is necessary to remove or rearrange the property of other utilities to perform the work, then MUNICIPALITY will not be responsible for rearranging or bearing the cost of rearranging the property of such utility but will in all events cooperate as far as legally possible, without expense to itself, in obtaining the rearrangement or removal of such utilities' property.

ARTICLE 10. INSTALLATION OF DISTRIBUTION MAINS

10.01 PURVEYOR shall not be obligated to provide or install distribution mains or other equipment for the distribution within the geographic boundaries of MUNICIPALITY of water from trunk mains to service connections. With the exception of those water mains specifically identified on Exhibit B, MUNICIPALITY shall bear the expense of cleaning and relining all distribution mains located within MUNICIPALITY'S corporate limits.

10.02 PURVEYOR may install water mains less than twenty inches (20") in diameter within the corporate limits of MUNICIPALITY when, in the opinion of the Commissioner, such installation is suitable and necessary to supply a large segment of PURVEYOR'S service area, whether or not such area is totally or partially within MUNICIPALITY'S corporate limits, provided MUNICIPALITY and PURVEYOR sign a written agreement authorizing PURVEYOR to construct said main. Whenever PURVEYOR and MUNICIPALITY agree in writing that PURVEYOR may install such a main less than twenty inches (20") in diameter within the corporate limits of MUNICIPALITY, and PURVEYOR agrees to bear the cost of installation, then PURVEYOR shall bear the cost of construction, installation, repairing, maintaining, cleaning and relining such main for all time. PURVEYOR shall not be liable for the cost of installation of any such main less than twenty inches (20") in diameter in the absence of such written agreement. In the event that PURVEYOR shall install and bear the expense of such main, then PURVEYOR shall have the

right to restrict the use of the main so that it would not be permitted to be tapped for service connections or connecting water mains. PURVEYOR shall have the right to allow service connections to be tapped to such main, and shall have the right to condition such permission on the payment of a tap-in charge representing a fair proportion of PURVEYOR'S cost of installation of such main. Such tap-in charges shall be in addition to established connection charges and in lieu of any other assessment. Where a permit is issued for the connection of a fire hydrant, the entire cost of such fire hydrant installation to such main installed by PURVEYOR shall be paid in advance to PURVEYOR by MUNICIPALITY or the party requesting such installation. No tap-in charge shall be assessed by PURVEYOR for the privilege of connecting a distribution main to any water main constructed under the provisions

10.03 No main less than twenty inches (20") in diameter, which primarily functions as a trunk main, that is, primarily furnishing water to other distribution mains and not to service connections, shall be installed at the cost of MUNICIPALITY without MUNICIPALITY'S consent in writing.

10.04 No distribution main or fire hydrant shall be constructed and connected to the waterworks system unless the following requirements have been satisfied:

(a) Prior to construction of the main, preliminary plans shall be furnished to the Commissioner in duplicate which shall show:

(1) the street and other public ways and places in which such distribution main is to be installed, with the location of all monuments or stakes necessary to establish the centerline of such streets or other public ways;

(2) the present surface of the street;

(3) the established grade of the street, (including cases where the grade is established, but the street or public way has not been graded in accordance with the established grade);

(4) the proposed size and location of all mains, pipes, valves, hydrants and other appurtenances and the location of existing or proposed sanitary sewers. PURVEYOR may request modification to said plans and final plans shall be drafted and submitted incorporating all modifications required by Commissioner. Eight copies of the final plans shall be furnished to Commissioner in accordance with the provisions of this AGREEMENT. Upon approval of final plans, installation of the main may commence. Six copies of the final plans will be retained by the Commissioner in the files of the Division of Water. Two copies of the plans shall be returned to MUNICIPALITY, one of which shall be retained in the files of the MUNICIPALITY.

(b) PURVEYOR shall have the right to refuse to approve the construction of a new water main or the extension of an existing water main and the right to refuse connection of a new water main or service connection to the existing water system in any area where sanitary sewers and sewage treatment facilities, or plans for such facilities, have not been approved by the local sewer authority and MUNICIPALITY or in any area where the Ohio Environmental Protection Agency has imposed a tap-in ban prohibiting additional connections to the existing sewer system serviced by the local sewer authority. In the event that PURVEYOR has approved construction of a water main on the basis of plans for sewer facilities, PURVEYOR may refuse to approve connection of such water main until the sewer facilities have been constructed.

(c) When distribution mains are to be installed in a street dedicated by the owner to the public and properly recorded, but not accepted by the MUNICIPALITY, said distribution main may not be constructed until the owner shall grant and record an easement for the full length and width of such street to MUNICIPALITY and PURVEYOR, providing for the installation of water mains, service connections and appurtenances and their maintenance pending acceptance of the street by MUNICIPALITY.

(d) All pipes and fittings shall comply with standard Department of Public Utilities specifications, as same shall be modified from time to time by the Commissioner. All valves, valve boxes, hydrants, and service connections with their fittings such as corporation cocks, stop cocks, and stop cock boxes and the like, shall be of the same pattern and type and of the same quality of material and shall operate in substantially the same manner as those used by PURVEYOR within its corporate limits with the exception of the hydrant threads, which shall be standard threads if so desired by MUNICIPALITY. All construction, including backfill, shall be that required by PURVEYOR. No better type or quality of materials and construction shall be required by PURVEYOR in MUNICIPALITY than is required of PURVEYOR.

(e) The Commissioner shall have the right to determine the size of all mains, pipes, and service connections used for the supply of water hereunder; the same shall conform to the requirements established by PURVEYOR within its own corporate limits under similar circumstances.

(f) All mains twelve inches (12") or less in diameter and all service connections, shall be laid not less than six feet (6') below the established grade of the street or other public way measured down to the top of mains or service connections. Mains sixteen inches (16") in diameter shall be laid not less than five feet (5') below the established grade.

ARTICLE 11. CONNECTION OF NEW DISTRIBUTION MAINS; INSPECTION AND TESTING

11.01 PURVEYOR shall not be obligated to supply water service to any new distribution water main or any new service connection unless and until all of the following provisions have been complied with:

(a) Before the installation of any main may proceed, MUNICIPALITY shall cause a professional engineer to set the required line and grade stakes so that the main and appurtenances are placed in the proper location and at the correct elevation. The cost of such services shall be borne by MUNICIPALITY or other interested party.

(b) Parties seeking to install a new main shall notify Commissioner of the intention to begin work on the installation of any water main at least three days prior to such starting date. PURVEYOR shall have the right to inspect and test any and all materials used or to be used in the construction and installation of any part of the water supply and distribution system within the corporate limits of MUNICIPALITY. The times and method of inspection and testing shall be determined by the Commissioner. MUNICIPALITY shall grant PURVEYOR access to all streets, public ways, all parts of the water system and all other places where materials are located, or construction or any work to be done is carried on, and shall cooperate with PURVEYOR to carry out the work of inspection and testing as provided herein.

(c) All water mains shall be disinfected and chlorinated by PURVEYOR at the expense of the party installing the main. The party installing the main shall give Commissioner reasonable notice as to when the mains are ready for such work. The process of disinfection and chlorination, and the rate of application shall be determined by the Commissioner.

(d) All water mains shall be tested with hydrostatic pressure by MUNICIPALITY or other interested party at its expense under procedures for hydrostatic testing and the pressure to be applied to be determined by the Commissioner. MUNICIPALITY shall cause to be prepared and delivered to PURVEYOR record prints prior to final testing of the main.

11.02 All work of inspection and testing performed by PURVEYOR pursuant to Section 11.01 (b) above shall be at the expense of PURVEYOR provided, however, that if such expense in the MUNICIPALITY shall become greater than the average expense for such services on behalf of other municipal users of the water system during a comparable period, then in that event, PURVEYOR shall have the right to charge the party requesting such services for all or a portion of the excess cost that is greater than the average cost in other municipalities. Such excess costs shall be paid within thirty (30) days from the date of PURVEYOR'S bill for such services. All work of inspection and testing performed by

MUNICIPALITY shall be at the expense of the MUNICIPALITY.

ARTICLE 12. MAINTENANCE OF DISTRIBUTION MAINS

12.01 PURVEYOR shall be responsible for and shall bear the expense of the repair and maintenance of all distribution mains and appurtenances, except as otherwise provided herein. Effective as of the first rate increase pursuant to Article 4, the cost of said repair and maintenance will be included as a part of the water rate on a system wide basis.

ARTICLE 13. DAMAGE TO SYSTEM AND RELEASE OF LIABILITY

13.01 MUNICIPALITY agrees to make no claim against PURVEYOR on account of any break or leak in any water main, or fire hydrant in any public street, highway or easement which claim arises before PURVEYOR has notice of such leak and before PURVEYOR has had a reasonable period of time to act after such notice is received to cure any such condition.

13.02 MUNICIPALITY shall bear the cost of repairing water mains and service connections that may be damaged due to being embedded wholly or partly within a sewer, manhole or catch basin. MUNICIPALITY shall leave PURVEYOR harmless from any claim for damages caused by a break in any water main, pipe or service connection that results from the water main, pipe or service connection being embedded wholly or partly within a sewer, manhole or catch basin in violation of regulations of any environmental protection agency.

13.03 Repair and maintenance of new valve boxes, hydrants, service connections and their appurtenances installed by a contractor shall be the obligation of MUNICIPALITY for a period of two years after completion, unless the contract for such installation provides for such maintenance to be furnished by the contractor or some other party.

13.04 If any contractor employed by MUNICIPALITY damages any water mains or other water plant facilities which are the property of PURVEYOR, MUNICIPALITY shall be responsible for the repair of said facilities or pay PURVEYOR for such damage, upon receipt of bill.

ARTICLE 14. MAINTENANCE OF DISTRIBUTION SYSTEM BY MUNICIPALITY

14.01 In the event that MUNICIPALITY desires to undertake the repair and maintenance of all or any part of the distribution system located within its geographic territory, MUNICIPALITY and PURVEYOR may, by mutual agreement, enter into a written agreement supplemental to this AGREEMENT modifying and amending this AGREEMENT with respect to the duties, responsibilities and liabilities related to such maintenance and repair work. Nothing in this AGREEMENT shall prohibit MUNICIPALITY from becoming a Master Meter Community if MUNICIPALITY and PURVEYOR can reach mutually agreeable terms and conditions for such change in status.

ARTICLE 15. SERVICE CONNECTIONS

15.01 No service connection or meter vault may be constructed or connected to the waterworks system until a permit for such construction or connection has been obtained from PURVEYOR.

15.02 Before a permit for a service connection and/or meter vault is issued by PURVEYOR, the applicant requesting same shall procure a certificate from MUNICIPALITY indicating: (1) the location and desired size of the proposed service connection or meter vault; (2) that applicant has made satisfactory arrangements with MUNICIPALITY for any necessary openings in the street or public highway, excavating, trenching, disposal of excavating material, backfilling of trenches with sand, placing temporary wearing surface, maintenance of surface, maintenance of surface in advance of permanent replacement of roadway, sidewalks or driveways, including the erection and maintenance of lights, signs and barricade for

same without expense to PURVEYOR and relieving PURVEYOR of all responsibility and liability that may arise from the performance of any work by applicant or his contractor.

15.03 Only distribution mains within the corporate limits of MUNICIPALITY shall be tapped for the purpose of making service connections for the general supply of water to any premises within the corporate limits of MUNICIPALITY.

15.04 A service connection to a water main shall be permitted only if the water main extends across the full length of frontage of the premises to receive water service from the service connection. Service connections shall be permitted only to premises which abut a street in which a distribution main is situated or where an easement for water supply purposes extends from the premises to a street in which a distribution main is located.

15.05 A single service connection shall supply no more than one building. In multi-unit buildings, such as are located in shopping centers, or such other structures where units within that structure may be sold individually, the Commissioner shall determine the number of service connections necessary to adequately provide service to the building.

15.06 All service connections to any main located in a street or other public way or place shall be installed by PURVEYOR at the expense of the party ordering the service. The service line shall be installed by PURVEYOR up to a point approximately two feet (2') back of the curb line. Such installations shall include all stop cocks and valves.

15.07 No service connections shall be extended beyond the curb box or valve at the curb to a building until permits for such extension, for the sealing of a meter therein, and for water to be used for construction purposes have been obtained from PURVEYOR. Said permit will be issued only after submission to PURVEYOR of a written application, together with a building permit issued by MUNICIPALITY. MUNICIPALITY agrees that its officers vested with the authority to issue building permits will, before issuing any permit for construction work which will require the use of water, first require the applicant to furnish a certificate secured from PURVEYOR stating that the rules and regulations of the Division of Water have been complied with, and that arrangements have been made with the Division of Water for use of water and for payment of all water used. The extension of a service connection from the stop cock box or valve at or near the curb ("pipe") shall be installed by and at the expense of the Direct Service Customer. The pipe must be of a type approved by the Commissioner and left uncovered in the trench until it has been tested and inspected by PURVEYOR at the expense of PURVEYOR. The water shall not be turned on until the pipe has been inspected and approved. MUNICIPALITY shall provide PURVEYOR with a copy of each occupancy permit or equivalent document issued by MUNICIPALITY within ten (10) days of issuance.

ARTICLE 16. METERS

16.01 Water meters and remote registers shall be installed on all service connections established within the territorial boundaries of MUNICIPALITY in such locations as the Commissioner shall determine. Water meters and remote registers shall be supplied by PURVEYOR and shall remain the property of PURVEYOR. The cost of the water meters and remote registers and the cost of their installation shall be paid for by the Direct Service Customer.

16.02 Meters shall be set in a vault within the dedicated right-of-way when required by the Commissioner. When vaults are required, they shall be furnished and installed by the Direct Service Customer and approved by the Commissioner, all in strict conformity with the rules and regulations of the Division of Water.

16.03 Water meters and remote registers on existing service connections that were not originally supplied by PURVEYOR to the water consumer, did not meet the specifications of PURVEYOR at the time of installation and do not accurately register the consumption of water, shall be repaired and/or replaced by PURVEYOR at the expense of the Direct Service Customer. All water meters and/or remote registers which must be replaced and/or repaired as the result of theft or damage from causes other than normal wear and tear shall be repaired and/or replaced by PURVEYOR at the expense of the Direct Service Customer. Notwithstanding anything to the contrary in this paragraph, a water meter and/or remote register supplied by PURVEYOR which must be repaired or replaced as a result of defects in material or workmanship, or normal wear and tear, shall be repaired and/or replaced at PURVEYOR'S expense.

16.04 In cases where, with the consent of PURVEYOR, the Direct Service Customer is the owner of a reregistering meter, maintenance and repairs on said meter shall be made by PURVEYOR at the expense of the Direct Service Customer on the basis of the cost of material and labor plus twenty-five percent (25%) of the cost of materials and labor to compensate PURVEYOR for supervision and overhead expenses.

16.05 If any water meter shall fail to register correctly within the limitations established in the ordinances and rules and regulations of PURVEYOR applicable thereto, the Direct Service Customer shall be charged for water usage based on the consumer's average daily rate of consumption. The consumer's average daily rate of consumption shall be estimated by Commissioner based upon water usage registered under similar conditions when the meter was in working order. PURVEYOR shall use the same criteria in estimating consumption of Direct Service Customers and customers within the City of Cleveland.

ARTICLE 17. FIRE HYDRANTS

17.01 MUNICIPALITY shall not use nor permit the use of water from fire hydrants, valves or other openings within the corporate limits of MUNICIPALITY unless the use of such water is metered or is in conformance with the provisions of this Article 17.

17.02 MUNICIPALITY has the right to connect fire hydrants to PURVEYOR'S water supply system and to make use of all water required by MUNICIPALITY for the extinguishment of fires; the flushing of fire hydrants, streets and sewers and for such other use as is specifically authorized by Commissioner. For this right, MUNICIPALITY shall pay an annual fee in advance at such rates, in such manner, and at such times as shall be provided in applicable ordinances or rules and regulations of PURVEYOR existing at the time this AGREEMENT is executed or as amended in the future. The rate charged for the use of water from a fire hydrant shall be calculated to cover only PURVEYOR'S actual cost of estimated water losses for uses other than extinguishment of fires, but in no event shall said rate exceed the rate authorized to be charged to a Direct Service Customer located in the same service district. MUNICIPALITY shall maintain records of its use of water from fire hydrants for the purpose of establishing charges for such use. Except as otherwise provided in this Article 17, there shall be no unaccounted for or other free use of water by MUNICIPALITY.

17.03 No water shall be taken from any fire hydrant for construction or any other purpose except as provided in Paragraph 17.02 without first obtaining a permit for said use from the Commissioner. The issuance of such permit shall be conditioned upon compliance with rules and regulations issued by PURVEYOR, including but not limited to, prepayment for water which said applicant may reasonably be expected to use, at rates not higher than the rates in effect for the service district in which the fire hydrant is located. The Commissioner shall have the power to revoke any permit issued in order to protect PURVEYOR against waste of water or for any other reasonable purpose.

17.04 MUNICIPALITY shall be responsible for and, except as otherwise provided herein, shall bear the expense of installation of, periodic inspection of and maintenance and/or repair of all fire hydrants located within its corporate limits. MUNICIPALITY may repair or replace fire hydrants that are not functioning properly. If any such repair or replacement is required as the result of normal wear and tear, then MUNICIPALITY may bill PURVEYOR for the reasonable cost thereof upon submission to PURVEYOR of documentation of the work done and the actual cost thereof. PURVEYOR reserves the right to reject any bill for costs which PURVEYOR deems to be unreasonable.

ARTICLE 18. CHANGE IN GRADE OF STREETS

18.01 Where the established grade of any street or public way under which trunk mains, mains, pipes, or service connections are installed is to be altered or re-established at more than one foot (1') below the grade used for the installations, then MUNICIPALITY shall lower or shall cause to be lowered the trunk mains, mains, pipes, or service connections to the depth required in Paragraph 10.04(1), at no cost to PURVEYOR.

18.02 Where the established grade of any street or public way under which trunk mains, mains, pipes, or service connections are installed is to be altered or re-established at more than two feet (2') above the grade used for such installation, MUNICIPALITY shall replace or shall cause to be replaced such trunk mains, mains, pipes, or service connections to the depth required in Paragraph 10.04(1), at no cost to PURVEYOR.

18.03 Where relocation or re-establishment of grade is made of any street or public way by MUNICIPALITY, or with its consent or approval, which relocation or re-establishment of the street or public way causes all or part of existing trunk mains, mains, hydrants, service connections or meter vaults to be located outside of the relocated street or public way, then MUNICIPALITY shall cause such trunk mains, mains, hydrants, service connections or meter vaults to be relocated within the limits of the relocated street or public way at no cost to PURVEYOR or shall cause an easement to be granted to PURVEYOR and MUNICIPALITY covering the property within which such trunk mains, mains, hydrants, service connections or meter vaults are located for the purposes of using, installing, repairing and maintaining such facilities.

ARTICLE 19. VACATION OF STREETS

19.01 Where any dedicated or proposed street, wholly or partly improved with water facilities, is to be vacated in a MUNICIPALITY, the MUNICIPALITY or the owner of the street shall file a notice of such proposed vacation with PURVEYOR before the effective date of the vacation.

19.02 Within thirty (30) days of the receipt of the notice provided for in Paragraph 19.01, PURVEYOR shall notify MUNICIPALITY in writing of any relocation or alteration in water facilities required by the street vacation. Such relocation or alteration shall not be required if the existing water facilities are located within an easement to the MUNICIPALITY and PURVEYOR in a form satisfactory to the PURVEYOR.

19.03 Any relocation or alteration of water mains, service connections, fire hydrants, valves, curb cocks, meters, or meter vaults or other water facilities in any street or public way necessitated by a street vacation, shall be at the expense of MUNICIPALITY, or the benefiting party. Should MUNICIPALITY, or the benefiting party, be unwilling or unable to make the relocation or alteration required, then PURVEYOR may proceed with the relocation or alterations and be reimbursed as hereinafter provided. MUNICIPALITY or the party benefiting from the street vacation shall be billed for the total cost of such relocation or alteration and shall have two months from the date of receipt to pay PURVEYOR the total amount of the bill. If the total amount due and owing is not paid within the two month period, then said

for any additional extensions of water mains or any additional service connections within MUNICIPALITY'S corporate limits may be withheld until the amount is paid in full.

ARTICLE 20. CAPITAL IMPROVEMENT PROGRAM

20.01 PURVEYOR'S engineers have determined that the capital improvements listed in Exhibit C attached hereto will be beneficial to the efficient operation and expansion of the water system as a whole and PURVEYOR plans and agrees to complete these improvements within ten (10) years from the date of this AGREEMENT provided that necessary funding can be obtained from the issuance and purchase of bonds and through the collection of water revenues and provided further that the collection of water revenues from PURVEYOR'S customers are sufficient to meet PURVEYOR'S obligations under the terms of its bond indentures, both existing and to be issued, and are sufficient to meet the expenses of all of PURVEYOR'S obligations to provide services under this AGREEMENT, and are sufficient to meet the Division of Water and Heat's general operating and administrative expenses. PURVEYOR specifically agrees and covenants that it will make a good faith effort to issue and sell bonds needed to complete the capital improvement program contemplated herein and will make a good faith effort to set rates sufficient to meet the obligations set forth herein.

20.02 MUNICIPALITY agrees that to the extent any of the capital improvements listed in Exhibit C is located within MUNICIPALITY'S corporate limits or the construction or completion thereof can be affected in any way by any act or failure to act by MUNICIPALITY then MUNICIPALITY will cooperate with PURVEYOR to facilitate such construction and in the acquisition by PURVEYOR of land for such construction, provided such action does not require MUNICIPALITY to incur any expense.

ARTICLE 21. ANNUAL REPORTS

21.01 MUNICIPALITY shall furnish to PURVEYOR, within thirty (30) days after a written request from PURVEYOR, the location and size of all water pipes, valves, service connections and fire hydrants laid or placed within the corporate limits of MUNICIPALITY during the preceding year. PURVEYOR may request such information for periods of time longer than the preceding year if available and MUNICIPALITY shall be required to furnish such information within a reasonable period of time. Within ninety (90) days from the date of a request by PURVEYOR, MUNICIPALITY shall furnish to PURVEYOR, MUNICIPALITY'S best estimate of its requirements for expansion and future needs for water service for the next five (5) years.

ARTICLE 22. CURTAILMENT OF WATER SERVICE

22.01 When emergency conditions necessitate the temporary curtailment of water usage to insure that all water consumers will have adequate volume and pressure of water for essential health and safety purposes, PURVEYOR may order a temporary curtailment of water supply in all or any part of the geographic territory within MUNICIPALITY'S boundaries.

22.02 Upon telephone communication, public media announcement or other actual notice of an order to the Mayor or City Manager and/or the Safety or Service Director for temporary curtailment of water service, MUNICIPALITY agrees to take every reasonable and appropriate action to curtail the use of water by its inhabitants and users throughout the geographic territory affected by the order by enforcement of the ordinance referred to in Paragraph 22.01.

22.03 Within sixty (60) days after the execution of this AGREEMENT, MUNICIPALITY agrees to adopt legislation substantially in the form provided in Exhibit D and agrees to enforce its provisions in good faith. PURVEYOR shall have the right to inspect copies of any and all ordinances, rules and regulations, police citations reports and inspection memoranda regarding enforcement by MUNICIPALITY of

PURVEYOR'S order to curtail use of water.

22.04 Failure of MUNICIPALITY to make a good faith effort to enforce a curtailment order against an inhabitant of MUNICIPALITY after PURVEYOR has provided hand delivered written notice to MUNICIPALITY of the identity of an inhabitant who is in violation of the order, shall subject MUNICIPALITY to a penalty in the amount of Five Hundred Dollars (\$500.00) per day for each day MUNICIPALITY fails to make a good faith effort to enforce the curtailment order against said inhabitant. Before assessing the penalty authorized by this Paragraph, PURVEYOR shall provide the highest ranking official of MUNICIPALITY with hand delivered written notice of PURVEYOR'S intent to assess the penalty and of the reason for the proposed penalty. MUNICIPALITY shall have the opportunity to remedy and remove the penalty by making good faith effort to enforce the curtailment order against the violating inhabitant within six (6) hours. If, within the six (6) hour time period, MUNICIPALITY has taken appropriate action, PURVEYOR shall waive any penalty.

22.05 Permission for any additional water mains, extension of water mains or any additional service connections within MUNICIPALITY'S corporate limits shall be denied until any unpaid penalties assessed in accordance with this Article 22 have been paid.

22.06 A curtailment order under this Article 22 shall automatically expire seven (7) days after it is instituted unless renewed prior to that time by PURVEYOR and PURVEYOR notifies MUNICIPALITY of the renewal.

22.07 MUNICIPALITY hereby agrees that the penalties provided for herein are necessary to allow PURVEYOR to preserve the hydraulic integrity of the water supply system and are not excessive.

ARTICLE 23. TERM OF AGREEMENT

23.01 The term of this AGREEMENT shall be for a minimum period of ten (10) years commencing on the first day after execution of this AGREEMENT by PURVEYOR, and shall automatically continue in effect from year to year thereafter. This AGREEMENT may be cancelled by either party herein by giving written notice to the other party at least five (5) years prior to the effective date of termination, provided that no such notice may be given until five (5) years after the date upon which this AGREEMENT is executed by PURVEYOR. Any notice of cancellation shall be by certified mail, return receipt requested, addressed to the Director in case of PURVEYOR or the highest ranking official in case of MUNICIPALITY. In the event of termination of this AGREEMENT, following notice of cancellation by either party, the Director or his designated representative shall have sole control over the terms and conditions of the operation of the water system within MUNICIPALITY'S geographic territory, so long as water is being supplied by PURVEYOR to said territory.

ARTICLE 24. MISCELLANEOUS PROVISIONS

24.01 MUNICIPALITY and PURVEYOR expressly agree that the terms, covenants and conditions made in this AGREEMENT shall bind its respective council, officers, mayors and officials for the term of this AGREEMENT and they have authority to execute this AGREEMENT.

24.02 If any governmental unit, department, division, body or office referred to in this AGREEMENT shall cease to exist or shall cease to retain any part of its powers and duties material to the performance of this AGREEMENT, which are vested in them at the time of the execution of this AGREEMENT, then all references to them shall be deemed to include whatever governmental units, department, division, body or office shall then succeed to or have the powers and duties material to performance of this AGREEMENT without regard to title or formal designation.

24.03 PURVEYOR and MUNICIPALITY agree that in performing the rights, duties and obligations under this AGREEMENT they must at all times act in good faith.

24.04 MUNICIPALITY agrees that all ordinances, rules and regulations of PURVEYOR now or hereafter applicable to the operation, management and control of PURVEYOR'S water system shall be included in this AGREEMENT for all purposes, provided the ordinances, rules and regulations are not in conflict with provisions of this AGREEMENT. If any such ordinances, rules or regulations are in conflict with provisions of this AGREEMENT, the provision of this AGREEMENT shall apply.

24.05 Whenever under the terms of this AGREEMENT, PURVEYOR is required to bear any expense or fund any improvement to the water system, MUNICIPALITY agrees the cost of said expense or funding shall be recovered from revenues of the Division of Water and Heat and not from PURVEYOR'S General Fund.

ARTICLE 25. TERMINATION OF ALL PRIOR AGREEMENTS

25.01 All prior water service agreements, supplemental water service agreements and conditions of water service between PURVEYOR and MUNICIPALITY, verbal or written, are hereby terminated.

25.02 MUNICIPALITY and PURVEYOR release each other of any and all claims arising under or in connection with any previous water service agreements between them.

ARTICLE 26. MODIFICATIONS; UNDERSTANDING; LEGALITY

26.01 No covenant, agreement or condition of this AGREEMENT shall be waived, altered or modified except by a written instrument executed by the party against whom enforcement of such waiver, alteration or modification is sought. No waiver of any covenant, term or condition of this AGREEMENT shall affect any other covenant, term or condition of this AGREEMENT.

26.02 This AGREEMENT contains all the promises, agreements, conditions, inducements and understandings between MUNICIPALITY and PURVEYOR, and there are no promises, agreements, conditions, understandings, inducements, warranties or representations, oral or written, express or implied, other than as set forth in this AGREEMENT.

26.03 In the event any term or provision of this AGREEMENT shall for any reason be held invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other term or provision hereof, and this AGREEMENT shall be interpreted and construed as if such term or provision, in the event the same have been held to be invalid, illegal or unenforceable, had never been contained herein.

ARTICLE 27. NOTICES

27.01 Notice of cancellation of this AGREEMENT shall be delivered by certified mail. All other notices required to be given under this AGREEMENT shall be delivered by regular mail.

27.02 Notice to PURVEYOR required to be given under this AGREEMENT shall be delivered to the following address: DIRECTOR OF PUBLIC UTILITIES, CITY OF CLEVELAND, 1201 LAKESIDE AVENUE, CLEVELAND, OHIO 44114.

A copy of any such notice shall be delivered to the following address: COMMISSIONER, DIVISION OF WATER, CITY OF CLEVELAND, 1201 LAKESIDE AVENUE, CLEVELAND, OHIO 44114.

DUPLICATE ORIGINAL

27.03 Notices to MUNICIPALITY required to be given under this AGREEMENT shall be delivered to the following address:

MAYOR'S OFFICE

CITY OF WESTLAKE

27216 HILLIARD BOULEVARD

WESTLAKE, OHIO 44145

IN WITNESS WHEREOF, the parties have caused this instrument to be executed as of the day and year first above written.

IN THE PRESENCE OF:

THE CITY OF CLEVELAND

By: [Signature] 3/19/90
ALCO, Director, Department of Public Utilities

CITY OF WESTLAKE
MUNICIPALITY

By: Dennis M. Clough
(Name)

Mayor
(Title)

William E. Blaker

Loraine Underkorn

3/15/90

Approved as to Legal Form
with Memorandum of Understanding

Patrick A. Janow
Director of Law
City of Westlake, 15

EXHIBIT A (SEE BACK COVER)

(A map of the service districts located within the territorial boundaries of MUNICIPALITY will be attached).

EXHIBIT B

PURVEYOR shall bear the expense of cleaning and relining only the following distribution mains:

Name of Street or Road	From:	To:
Grantwood Road/Broad- view Road/East Ridge- wood Drive/Crossview Road/Chestnut Road	State Road	Brecksville Road
Pleasant Valley Road	Horiz Road	District Line at I-77
Broadview Road	Skyview Drive	Sprague Road
Ridge Road	North of Sprague Road	South of Ohio Turnpike
State Road	Pleasant Valley Road	Boston Road
Wallings Road	Ridge Road	Broadview Road
Pearl Road	Luckin Avenue	Bagley Road
West 110 Street	Snow Road	Drake Road
York Road	Pearl Road	Akins Road
Center Ridge Road	Wooster Road	Clague Road
Hilliard Road/Boulevard	Wooster Road	Clague Road
Wagar Road/ West 210 Street	Westway Drive	Westwood Avenue
Columbia Road	Hilliard Boulevard	Sprague Road
Rockside Road/ Broadview Road	Brecksville Road	Brookpark Road
Aurora Road/South Milca	Northfield Road	County Line
Bainbridge Road	South of Detroit Road	Mill Road
Dover Center Road	Nottingham Road	East 250 Street
Lake Shore Boulevard	South Woodland Road	U.S. Route 422
S.O.M. Center Road	Detroit Road	Lorain County Line
Bradley Road	Richmond Heights West Corporation Line	Wetzel Road
Chardon Road	Detroit Road	Lorain County Line
West Lake Road	West 130 Street	Broadview Road
Snow Road	Willoughby Hills North Corporation Line	Mayfield Village South Corporation Line
S.O.M. Center Road	Eddy Road	Wilson Mills Road
Bishop Road	Mayfield Heights West Corporation Line	Cardinal Line
Mayfield Road	Mayfield Heights North Corporation Line	Deadend South of Fairmount Blvd.
S.O.M. Center Road	Westlake Road	Detroit Road
Bradley Road		

Dover Center Road
 Royaltan Road
 Green Road
 Walling Road
 Royaltan Road
 Lorain Road
 Warrensville Center
 Road
 Cedar Glen (Cedar Hill)

Westlake Road
 Pearl Road
 Balmree Road
 Broadview Road
 District Line, West
 of Bennett Road
 West 208 Street
 Mayfield Road
 Murray Hill

Detroit Road
 District Line West
 of Bennett Road
 Chagrin Boulevard
 District Line at
 Pershing Drive
 District Line
 at I-77
 Clague Road
 South Euclid
 South Corporation Line
 Euclid Heights
 Boulevard

EXHIBIT C

PURVEYOR'S engineers have determined that the following capital improvements will be beneficial to the efficient operation and expansion of the water system as a whole:

PHASE I

Columbus Road Bridge Water Main
 Warrensville Reservoir Construction
 Engle Rd. 10 MO Reservoir & Basky/Whitney Supply Water Main Construction
 Broadway Booster Pump Station Land Purchase
 New Division Filter Plant Design and Construction Management Services
 Nottingham Pump Station First High Service Improvements, 36" 1st HS Main
 Installation of Dual-Drive Backup Pump at Pleasant Valley Pump Station
 Blossom Water Tower — 3 MO Storage
 Construction of Broadway Booster and Pump Station and Related Supply Mains
 Division Water Pumping Plant Office, Maintenance and Heating Facilities
 Installation of Dual-Drive Backup Pump at Cedar-Winchester Pump Station
 Installation of Dual-Drive Backup Pump at Independence Pump Station
 Construction of Willow Booster Station
 Cleaning and Relining Water Mains
 Construction of Baldwin Filter Plant Restoration
 Division Railroad Track Replacement
 Division Site Fence Replacement
 Construction Division Chemical House Exhaust Scrubber System
 Construction of Woodhill Road 2nd High Service Supply Main
 Nottingham Plant Coagulation, Filtr. & Res. Modification & Replacement Engrg.
 Construction of Palmyra Raw Water Reservoir Sidewalks and Bottom
 Nottingham Pumping 2nd High Service Improvement-Engrg.
 Nottingham Pumping 2nd HS Improvements

Construction of Crown Site Erosion Control
 Crown Purification Instrumentation Replacement
 Baldwin Purification Sludge Collection, Backwash Recirculation and Disposal Facilities Engineering
 Construction of Division Pumping Station Roadway and Site Improvements
 Construction of Division Pumping Station House Electrical Service
 Construction of Crown Heating Boiler Replacement
 Construction of Power Positioner in Permit Control Center
 Construction of Southwest Site Maintenance Yards
 Purchase & Installation of Hydrants, Valves & Pipe Replacement
 Construction of Nottingham Plant Washwater Inlets
 Baldwin Plant Washwater Pump Replacement
 Construction of New Distribution Mains
 Purchase & Installation of Remote Outside-Reading Meters
 Construction of Nottingham Roofs
 Crown Site Perimeter Fence
 Construction of Fairmount Pump Station Roof
 Construction of Security Facilities—All Locations
 System Planning Engineer Report
 Crown Intake Improvements

PHASE 2

Construction of Baldwin Clearwell Joint Seals
 System Hydraulic Survey Service
 Construction of Independence Reservoir
 Construction of Nottingham Roadway & Site Improvements
 Construction of Highland-Brecksville 3rd High Service Pump Station
 Construction of Brecksville Reservoir
 Construction of Brecksville Supply Main
 Remodel Lakeside Pump Station for Offices
 Construction of Division Purification Settling Basin Bracing and Sealing
 Construction of Phase 1 of New Division Filter Plant
 Cleaning and Relining Water Mains
 Purchase and Installation of Hydrants, Valves & Pipe Replacement
 Construction of New Distribution Mains
 Purchase and Installation of Remote Outside Reading Meters
 Construction of Security Facilities—All Locations

PHASE 3

Construction of Nottingham Sludge Disposal Facilities
 Replacement of Filter Valves & Controls at Baldwin Water Plant
 Construction of Nottingham Plant Coagulation Filtration and Reservoir Modification & Replacement
 Construction of Crown Sludge Collection and Disposal Facilities
 Construction of Baldwin Sludge Facilities
 Construction of Primary Pumping Station Transformer Coolant Containment Dikes

EXHIBIT D
CURTAILMENT OF WATER USE (ORDINANCE TO BE ADOPTED BY
MUNICIPALITY)

Upon notice from the City of Cleveland, Division of Water and Heat of the Department of Public Utilities that a shortage of water supply exists which threatens the public health and safety and that the shortage makes it necessary to curtail water use within all or any part of (Municipality), the (Mayor) shall proclaim a water use emergency throughout all or any part of (Municipality).

A water use emergency proclamation shall specify:

- (a) the geographic area affected by the water use emergency;
- (b) the length of time the emergency shall be in effect which time shall not exceed seven (7) days; and
- (c) the degree of water use curtailment.

During a water use emergency, the (Mayor) may order a water use curtailment by prohibiting unnecessary use or consumption of water during all or specified hours of the day and/or may order that specified premises curtail necessary use or consumption of water on specified days only as the (Mayor) shall determine to be necessary.

A proclamation of a water use emergency shall become effective at the time of issuance by the (Mayor). Notice thereof shall be given to a newspaper of general circulation in (Municipality) and shall be reported to a local radio and television station for broadcast.

As used in this section, unnecessary use or consumption means the use or consumption of water for purposes other than personal health, safety, sanitation and bodily consumption. "Unnecessary use or consumption" of water includes but is not limited to sprinkling or watering lawns, other land irrigation, the washing of automobiles, houses or other structures and the use of water for recreational purposes such as the maintenance of swimming pools. The use of water for private construction such as the mixing and curing of concrete, the puddling of backfill in excavations, the moistening of masonry walls preparatory to pointing or sealing, and other similar uses is not an unnecessary use or consumption of water. The use of water to scrub and rinse areas such as hard-surfaced drives, garage floors, patios and similar uses where necessary for the purpose of sanitation and the protection of health is not an unnecessary use and consumption of water.

No person or entity shall during a water use emergency use water in violation of the terms and conditions of the Mayor's water use emergency proclamation.

Whoever violates this ordinance is guilty of a minor misdemeanor and shall be fined not more than one hundred dollars (\$100.00). Whoever violates this ordinance having been previously convicted of a violation of this ordinance is guilty of a misdemeanor of the third degree and shall be fined not more than five hundred dollars (\$500.00) or imprisoned not more than sixty (60) days, or both. A separate offense shall be deemed committed each day during or on which a violation or noncompliance occurs or continues.

DUPLICATE ORIGINAL

MEMORANDUM OF UNDERSTANDING

WHEREAS, the City of Cleveland ("Cleveland") and the City of Westlake ("Westlake") have entered into a Water Service Agreement dated March 19, 1990, known as City of Cleveland Contract No. 42180 ("Contract"); and

WHEREAS, Cleveland and Westlake desire to memorialize their understanding of certain provisions of the Contract;

NOW, THEREFORE, Cleveland and Westlake in consideration of the execution of the Contract do hereby mutually agree as follows:

1. Article 5 of the Contract provides that Cleveland will be the sole and exclusive supplier of water to Westlake. Cleveland and Westlake agree that the language of Article 5 of the Contract is not intended to grant an exclusive franchise to provide water service to Westlake and its inhabitants in violation of Westlake's Charter which prohibits the granting of an exclusive franchise for utility service to any utility company.

Westlake acknowledges that, as of the date of the Contract, Cleveland has been and will continue to be the sole supplier of water to Westlake and its inhabitants during the term of the Contract because there are no alternative sources of water supply to the community.

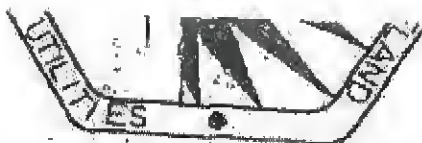
EXHIBIT C

However, in the event that the second sentence of Article 5 of the Contract is construed to be invalid, illegal or unenforceable, pursuant to paragraph 26.03 of the Contract, such invalidity shall not affect any other term or provision of the Contract, and the Contract shall be interpreted and construed as if the sentence had never been contained therein.

2. Cleveland and Westlake agree that in any construction project performed by Cleveland or its contractor in Westlake, pursuant to the Contract, Cleveland shall designate Westlake's inspectors to oversee all aspects of pavement restoration at no cost to Cleveland or its contractor. Westlake, through its Director of Engineering, agrees to furnish a list of names of inspectors and such other pertinent information to Cleveland. Westlake further agrees to cooperate with Cleveland to resolve any problems regarding pavement restoration under the terms of the Contract.

3. Cleveland agrees that payments will not be made to Cleveland's contractor for pavement restoration work in Westlake until Westlake states in writing that the work has been completed to Westlake's satisfaction and that all areas disturbed by Cleveland's contractor, or those in its employ, have been satisfactorily restored.

NT
VICE



LAND
SINAL

The undersigned, by signing below, agree that the foregoing represents their understanding of the provisions of the contract and agree that this Memorandum of Understanding shall remain on file with said Contract.

CITY OF WESTLAKE

By: Dennis M. Clough Mayor

CITY OF CLEVELAND

By: [Signature] 7/9/90

STAMP: The legal form and correctness of the within instrument hereby approved: [Signature]

CRAIG S. MILLER
Director of Law

By: Marlene Sanchez
Assistant Director of LAW

Date: 2-26-90

VCH212

-3-

VICE
PRESIDENT



TELAND
CINICAL

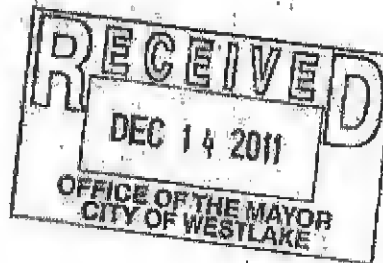


City of Cleveland
Frank G. Jackson, Mayor

Office of the Mayor
Cleveland City Hall
601 Lakeside Avenue, Room 202
Cleveland, Ohio 44114
216/664-3990 • Fax 216/420-8765
www.cleveland-oh.gov

December 14, 2011

The Honorable Dennis M. Clough
Mayor, City of Westlake
27700 Hilliard Road
Westlake, Ohio 44145



Dear Mayor Clough:

Based on recent statements attributed to you in the media, I wanted to take this opportunity to address several issues around the potential departure of the City of Westlake ("Westlake") from the Cleveland Division of Water (CWD) service area. The City of Cleveland ("Cleveland") and CWD believe it is in the best interest of Westlake to maintain its relationship with CWD. However, if the City of Westlake chooses to end this relationship, there are several key points that need to be understood, each of which will negatively impact the citizens of Westlake:

- The reliability of supply and delivery are weaker in the proposed Westlake system than in the CWD system;
- The hydraulic design of the proposed Westlake system suffers from multiple deficiencies that cast doubt on the viability of the proposed water delivery system;
- The study presents incorrect data regarding CWD's fire flow volumes; CWD volumes are higher than stated and stronger than the proposed Westlake system;
- Critical operational details are largely ignored and unbudgeted;
- If Westlake leaves CWD, Cleveland will hold Westlake accountable for financial and system impacts on CWD customers including \$39 million of stranded costs and \$17 million to mitigate the reliability impacts on Westlake's neighbors; and
- Claims regarding cost savings in the proposed Westlake system are built on flawed financial assumptions/information which will result in Westlake customer rates that are much higher than CWD rates.

Since forming our initial partnership, Westlake and CWD have enjoyed a mutually beneficial relationship built on the provision of safe and affordable drinking water. Over the past 30 years, CWD has taken great effort to ensure that a reliable supply of water is available to all our customers by investing over \$1.6 billion in the water delivery system and consistently working to deliver responsive, quality service to our jurisdictional partners. Over the past five years, Cleveland has openly engaged Westlake in an on-going dialogue on how to strengthen our relationship, including the option to transition to a master meter agreement or enter into a new direct water service agreement under which CWD would assume ownership of all water infrastructure in Westlake. As a result of these discussions, CWD has extended several direct benefits to the City of Westlake, such as stationing operational resources at the Crown Treatment Plant to reduce response times to water main breaks in Westlake, and spending over \$800,000 on repairs in Westlake since 2007.

EXHIBIT D

Because of this history of cooperation, Cleveland is concerned by how the information contained in HNTB's Phase 2 Water System Study has been presented publicly. Early in the development of their report, representatives of CWD offered to meet with HNTB, but this offer was declined. While disappointed that HNTB did not meet with our representative and Westlake did not share this information with Cleveland as your representatives had indicated they would do, Cleveland has a responsibility to all CWD customers, including the citizens of Westlake, to identify and address any issues in this report which are not accurately or completely represented. As a result, CWD's engineering staff reviewed HNTB's Phase 2 Water System Study. Based on this preliminary review, and the large differences in many of the financial and technical details in HNTB's Phase 1 and 2 reports, CWD engaged Arcadis to complete a more thorough analysis so that full and accurate information is available to all parties interested in this important decision. In the interest of sharing information, I have attached a copy of this analysis to this letter. The report identifies many concerns about HNTB's Phase 2 Study and the water delivery system it outlines.

The reliability of supply and delivery are weaker in the proposed Westlake system than in the CWD system

According to the HNTB report, the proposed water system will be serviced by the Avon Lake Municipal Utilities (ALMU) single treatment plant and connected via a single 30 inch main. Currently, CWD provides Westlake with sixty-five (65) connections, and the Crown Treatment Plant, which is located in Westlake, is interconnected with the Garrett Morgan Water Treatment Plant providing additional system redundancy. If the lone ALMU plant goes off-line, or if the single connection under Schwartz Road fails, Westlake will be dependent on a single 1 million gallon ground-level water storage facility that will have the capacity to provide approximately four (4) hours of back-up water supply. It is CWD's experience that the repair of transmission mains can take days depending on the nature of the failure. The interconnected Crown/Morgan system used by CWD has 35 million gallons of finished water storage and the emergency power back-up necessary to ensure a continuous water supply to Westlake during an emergency.

These concerns are similar to those raised by the Ohio RPA (OEPA) in April 2011. It is unclear to our experts whether Westlake's system as proposed would satisfy OEPA concerns. While HNTB's report is silent on the issue, CWD, based on documentation submitted by Westlake to the OEPA, is working from the assumption that Westlake would be dependent on three emergency connections to CWD's system for back-up service. To clarify the City of Cleveland's position as previously communicated to you, CWD will not provide back-up service if the City of Westlake disconnects from CWD's direct service. Providing back-up service to the City of Westlake is not legally required, nor does it make business or operational sense for CWD because of potential issues associated with pressure compatibility, water quality, and CWD resources.

The hydraulic design of the proposed Westlake system suffers from multiple deficiencies which cast doubt on the viability of the proposed water delivery system

We would like to bring to Westlake's attention several critical system issues that are not adequately or accurately addressed in HNTB's Phase 2 Study. Notably, the conversion of Westlake into a single water pressure zone is problematic for Westlake customers. Currently, CWD services Westlake with two pressure zones. Increasing water pressure in the current low pressure area, by up to 50 psi as noted in the HNTB report, will cause multiple issues. Although installing pressure regulators on individual homes may solve some of the problems, increasing pressure on water mains, service connections, valves and fire hydrants is likely to lead to more infrastructure failure, increasing customer inconvenience and costs.

Also, it is unclear whether HNTB performed any Extended Period Simulations (EPS), which give more confidence in the ability to recharge water storage. These analyses need to be run across multiple hours in order to fully evaluate whether the proposed limited storage capacity can be refilled in a timely manner. Our analyses indicate that, on a max consumption summer day, the proposed ground level tank cannot be recharged overnight, leading to potential water shortages.

Similarly, Hydraulic Grade (HGL) analysis is a prudent analysis to complete when designing a water system. We found it problematic for Westlake's customers, from a system integrity and maintenance perspective, that it was not included in the HNTB Phase 2 Study. Including HGL gives an enhanced insight into system performance, and exposes potential weaknesses in the system under high demand scenarios. When these values are included, our analysis indicates that the proposed system will not be able to meet demand during periods of peak usage.

Also, the use of a hard closed system leads to an increased likelihood of pressure surges, and the potential use of a pressure regulator on the 30 inch main will only exacerbate this issue. The use of a pressure regulator increases the likelihood of water hammer and surging, which also increases the likelihood of water main breaks. The cumulative impact of these effects is only magnified because of the proposed system's single connection, again likely resulting in greater inconvenience through loss of service and higher costs to be passed along to customers in Westlake.

The study presents incorrect data regarding CWD's fire flow volumes; CWD volumes are higher than stated and stronger than the proposed Westlake system

Perhaps most troubling is how the HNTB Phase 2 Study presented information on fire flows, which provide a measure of water available for fighting fires. The fire flow calculations presented in HNTB's Phase 2 Study are incorrect. HNTB used fire flows from the Insurance Service Office (ISO) without independently verifying them. HNTB concluded that CWD's fire flow capability at nine (9) of twenty-seven (27) areas examined is insufficient. CWD retested these nine locations and our field tests indicate all nine of the ISO field test values are too low, and that CWD had more than enough volume to meet the required amounts for fire protection.

Instead, if Westlake leaves CWD's service area, our analysis shows fire flows will decrease in most places along the northern, southern and eastern border of Westlake assuming a single feed from ALMU. While most areas retain sufficient, but reduced, coverage, our tests at the intersection of Detroit and Clagie Roads indicate a dramatic decrease, falling from 5,200 gpm to 1,073 gpm at 20 psi. Most residential homes require fire flow volumes of approximately 1,500 gpm, and as you are aware this testing area is proximate to several large facilities, including a large condominium development. Additionally, our analysis has identified eight other locations that will experience a dramatic reduction in fire flows.

Critical operational details are largely ignored and unbudgeted

Numerous vital operational details are largely ignored in HNTB's Study. There is no evaluation of a transition plan between CWD and Westlake operations. The logistics for switching suppliers are quite complex and are not adequately addressed in the report, particularly in light of the lack of emergency connections. This transition plan needs to be prepared and approved by all involved parties so that any potential dangers to water quality, water delivery to all customers (not just Westlake customers) and system costs are mitigated. Additionally, while the Phase 2 Study attempts to cover a number of general requirements associated with system start-up and

operations, including personnel, equipment and facilities, it lacks sufficient detail for the City of Westlake to make an informed decision.

If Westlake leaves CWD, Cleveland will hold Westlake accountable for financial and system impacts on CWD customers

The investments necessary to extend and provide water service to the City of Westlake have been shared across all CWD rate payers. If Westlake chooses to start its own water system, the City of Cleveland will take all necessary steps to recover these "stranded" costs to ensure that our continuing rate payers are made whole. Estimated at approximately \$39 million dollars in 2007, these "stranded" costs are briefly mentioned in HNTB's Phase 2 Study but are not adequately addressed. It is the City of Cleveland's position that these costs, which may have increased due to additional capital and system investments since 2007, must be accounted for in the City of Westlake's planning. As you know, Westlake is required to give Cleveland five (5) years notice if it leaves CWD. These "stranded" costs would be recovered during this period from Westlake customers by adjusting their rates to recover these costs.

Similarly, the integrity of CWD's water system must be protected for our remaining customers and jurisdictional partners. If Westlake withdraws from CWD, the water delivery systems of Westlake's neighboring communities, mainly Bay Village, Fairview Park, North Olmsted and Rocky River, will be negatively impacted. In order to continue to provide high quality water service to these communities, additional infrastructure investments would be required to account for the loss of connections through the City of Westlake. These "costs to cure" are estimated at approximately \$16 million, and would be the responsibility of the City of Westlake. In addition to the increased costs, the process required to ensure the integrity of CWD's water distribution system will necessitate CWD opening streets at multiple locations in the City of Westlake, including vital arteries such as Detroit Road, Clague Road and Hilliard Boulevard to physically cut and cap mains to accomplish the separation.

Claims regarding cost savings in proposed Westlake system are built on flawed financial assumptions/information.

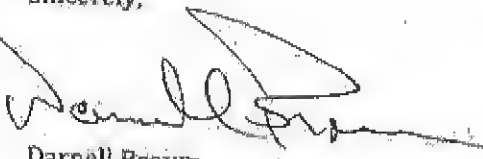
As a result of the above issues and several others, the assumptions used to justify the proposed system and rate savings are inaccurate. In addition to system and operational deficiencies, several errors were made in the financial analysis used to support the proposed 12% cost savings. For example, the study improperly calculated CWD billed values. Beginning in 2012, the volume of the first discounted block of water consumed will be reduced from 1 MCF to .6 MCF. In the analysis presented to the Westlake City Council on November 15, 2011, the discounted block rate was incorrectly applied to the .6 MCF value, overstating by \$8.19 how much Westlake customers will be charged under 2012 CWD rates. By correcting this one error, a significant portion of the proposed 12% cost benefit to customers disappears.

Also, based on an examination of the capital costs outlined in the Phase 2 report, the \$19 million used in the projected rate analysis for system build out is significantly understated. Based on the revised capital needs outlined by Arcadis, including costs to disconnect from CWD and connect to ALMU, construct necessary back-up connections, construct more adequate levels of ground storage and pumping capacity, and the costs to cure owed to the City of Cleveland, the true capital costs for Westlake are likely to be in excess of \$47 million. This more realistic estimation of capital costs leads to the proposed Westlake fixed charge (\$22.97) needing to be over 100% higher (\$56.82) than stated in the rate study, resulting in quarterly bills in the proposed Westlake system

approximately 18-20% higher than the CWD bill. This increase in quarterly bills does *not* include the impact of the "stranded" costs Westlake will be required to pay CWD, or the many operational ambiguities the City of Westlake will need to address, costs that will likely cause bills in the proposed system to rise for the citizens and businesses of Westlake. As a result of these increasing costs, claims about lower customer water charges for businesses and residents in an independent Westlake system are inaccurate.

These represent some of the City of Cleveland's concerns. Additional details and issues are identified in the attached report. It is our intent to ensure that all the pertinent considerations are examined so that CWD's current customers in Westlake have access to safe, dependable and affordable water. I look forward to discussing these issues with you, and working to bring this discussion to an equitable resolution for the City of Westlake and the City of Cleveland. If you have any questions, please feel free to contact me directly.

Sincerely,



Darnell Brown
Chief Operating Officer

cc: Members, Westlake City Council
Members, Cleveland City Council
Dave Maschak, Ohio EPA
The Honorable Kathy Mulcahy, Mayor, Orange Village, President SWCOG
Members, SWCOG
Members, Cuyahoga County Mayors and Managers Association
Valerie J. McCall, Chief of Government Affairs
Lisa Barbo, Executive Director, Cuyahoga County Mayors and Managers Association

FILED

2012 AUG -2 P 3:26

GERALD E. FUERST
CLERK OF COURTS
CLATSOP COUNTY

IN THE COURT OF COMMON PLEAS

CITY OF WESTLAKE, OHIO,

Plaintiff.

v.

CITY OF CLEVELAND, OHIO,

Defendant.

CASE NO. CV 12 782910

JUDGE MICHAEL ASTRAB

**ANSWER OF DEFENDANT CITY OF
CLEVELAND, OHIO TO PLAINTIFF'S
COMPLAINT**

(JURY DEMAND ENDORSED
HEREON)

Defendant City of Cleveland, Ohio, by and through counsel, for its Answer with separate defenses to Plaintiff's Complaint, states as follows:

INTRODUCTION

1. The City of Westlake prematurely seeks an advisory opinion interpreting the Water Service Agreement ("Agreement") despite the fact that it has not yet made or communicated a definite decision to leave the City of Cleveland's water system (the "System"). Its decision to leave the System would present significant logistical challenges to the City of Cleveland in continuing to provide high quality water and service to the member communities neighboring the City of Westlake. For this reason, the plain and unambiguous terms of the Agreement specifically require the City of Westlake to give notice five (5) years before leaving the System and to pay its fair share of the costs associated with terminating the Agreement.

FACTS COMMON TO ALL DEFENSES

2. The Cleveland water system operates as a self-supporting regional utility that supplies water to users in the City of Cleveland, as well as 68 communities in the surrounding

suburbs, including the City of Westlake, pursuant to direct service arrangements. The City of Cleveland also provides water to eleven additional communities on a master meter basis.

3. The City of Cleveland is empowered by Article XVII, Sections 4, 5, 6, and 12 of the Ohio Constitution and Section I of the Charter of the City of Cleveland to construct, own, and operate a water system. Further, Section 112 of the Charter of the City of Cleveland provides that the City's water rates "shall be fixed by the Board of Control, subject, however, to approval by the Council."

4. The City of Cleveland negotiated the terms of the Water Service Agreements with the Suburban Council of Governments (the "COG"). The COG is a legal entity recognized under Ohio law, which was expressly created to negotiate the terms of the Water Service Agreements with the City of Cleveland on behalf of the suburban communities. As a result, the Water Service Agreement is a standard agreement common to all of the suburban communities served by the System that has been signed by each of the service communities, including the City of Westlake.

ANSWER AND DEFENSES TO THE ALLEGATIONS IN PLAINTIFF'S COMPLAINT

PARTIES

5. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 1 of the Complaint and, therefore, denies the same.

6. Defendant admits the allegations set forth in Paragraph 2 of the Complaint.

7. Defendant admits that the parties entered into a Water Service Agreement ("Agreement") on March 19, 1990, the terms of which help govern the City of Cleveland's role in providing potable water and related services to the City of Westlake and its inhabitants. Defendant is without knowledge or information sufficient to form a belief as to the remaining allegations set forth in Paragraph 3 and, therefore, denies the same.

8. Defendant admits that the Agreement executed by the Parties provides for direct water service from the City of Cleveland to the City of Westlake. Defendant denies the remaining allegations set forth in Paragraph 4.

9. Defendant admits that the Agreement contains an Article 5. Further answering, Defendant states that to the extent Paragraph 5 purports to characterize or restate the information contained in the Agreement, the Agreement itself is the best evidence of its content and Defendant denies any inconsistent characterization of the contents of the same.

10. Defendant states that to the extent Paragraph 6 purports to characterize or restate the information contained in the Agreement, the Agreement itself is the best evidence of its content and Defendant denies any inconsistent characterization of the contents of the same.

11. Defendant admits that the Agreement contains an Article 23. Further answering, Defendant states that to the extent Paragraph 7 purports to characterize or restate information

contained in the Agreement, the Agreement itself is the best evidence of its content and denies any inconsistent characterization of the contents of the same.

12. Defendant admits that the City of Westlake has a Charter, which contains an Article XI, Section 5. Further answering, Defendant states that to the extent Paragraph 8 purports to characterize or restate information contained in Westlake's Charter, the Charter itself is the best evidence of its content and Defendant denies any inconsistent characterization of the contents of the same.

13. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation set forth in Paragraph 9 of the Complaint and, therefore, denies the same.

14. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation set forth in Paragraph 10 of the Complaint and, therefore, denies the same.

15. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegation set forth in Paragraph 11 of the Complaint and, therefore, denies the same.

16. Defendant admits that it entered into an Agreement with the City of Westlake on March 19, 1990, a copy of the Agreement is attached to Plaintiff's Complaint as Exhibit B. Further answering, Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations set forth in Paragraph 12 of the Complaint and, therefore, denies the same. To the extent Paragraph 12 purports to characterize or restate information contained in the Agreement, the Agreement itself is the best evidence of its content and Defendant denies any inconsistent characterization of the contents of the same.

17. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 13 of the Complaint and, therefore, denies the same.

18. Defendant admits that it entered into a Memorandum of Understanding ("MOU") with the City of Westlake, a copy of which is attached to Plaintiff's Complaint as Exhibit C. Further answering, Defendant states that to the extent that Paragraph 14 purports to characterize or restate information contained in the MOU, the MOU itself is the best evidence of its content and Defendant denies any inconsistent characterization of the contents of the same.

19. Defendant admits that it has been providing potable water to the City of Westlake and its inhabitants on an exclusive basis under the Agreement since 1990. Further answering, Defendant states that it is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations set forth in Paragraph 15 of the Complaint and, therefore, denies the same.

20. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 16 of the Complaint and, therefore, denies the same.

21. Defendant admits that the office of the Mayor of the City of Cleveland sent a letter to the Mayor of the City of Westlake on December 14, 2011, a copy of which is attached to the Plaintiff's Complaint as Exhibit D. Further answering, Defendant states that to the extent Paragraph 17 purports to characterize or restate information contained in the letter, the letter itself is the best evidence of its content and denies any inconsistent characterization of the contents of the same. Defendant denies the remaining allegations set forth in Paragraph 17 of the Complaint.

22. Defendant admits the allegations set forth in Paragraph 18 of the Complaint.

COUNT ONE — DECLARATORY JUDGMENT

23. Defendant restates and incorporates its responses to Paragraphs 1 through 19 of the Complaint as if fully set forth herein.

24. Defendant denies the allegations set forth in Paragraph 20 of the Complaint. Further answering, Defendant states that to the extent that the remaining allegations in Paragraph 20 call for a legal conclusion, no response is needed. To the extent a response is required, Defendant denies the remaining allegations.

25. The allegations in Paragraph 21 of the Complaint call for a legal conclusion for which no response is needed. To the extent a response is required, Defendant denies the allegations set forth in Paragraph 21 of the Complaint.

26. Defendant denies the allegations set forth in Paragraph 22 of the Complaint, including, but not limited to, its subparagraphs (a) through (e). Specifically, Defendant denies:

a. That the City of Westlake may obtain a secondary source of potable water without breaching the Agreement. Article 5.01 of the Agreement provides that the City of Cleveland is to be the sole supplier of water to the City of Westlake and its inhabitants for the term of the Agreement.

b. That the City of Westlake is not obligated to purchase all of its required potable water from the City of Cleveland during the five-year notice period contained in Article 23 of the Agreement. Article 5.01 of the Agreement provides that the City of Cleveland is to be the sole supplier of water to the City of Westlake and its inhabitants for the term of the Agreement.

c. That the Agreement's provision automatically extending the term of the Agreement following the first ten (10) year term to perpetual annual terms, but requiring a five (5) year notice period before the Agreement can be terminated, is unenforceable. Article 23 of the Agreement specifically and unambiguously sets forth the term of the Agreement and requires a five-year notice period prior to termination of the Agreement. This provision, which was negotiated by the communities, grants the communities greater flexibility in terminating the Agreement by allowing notice of termination in any year after the first ten (10) years, but also recognizes that the logistics of shutting down a water system and putting a new infrastructure in place could take five (5) years.

d. That the Agreement is unenforceable beyond twenty-five (25) years from its effective date. The twenty-five (25) year period is not ripe for three (3) more years.

e. That City of Cleveland is unable to recover "stranded costs" or other additional costs to "mitigate reliability impact" on neighbors. Article 4 of the Agreement contemplates such expenses if a community leaves the system and grants the City of the power to set the rates of its customers and specifically, to impose rate increases on customers who have taken steps toward leaving the System or cut costs where appropriate.

COUNT TWO – INJUNCTIVE RELIEF

27. Defendant restates and incorporates its responses to Paragraphs 1 through 23 of the Complaint as is fully set forth herein.

28. Defendant denies the allegations set forth in Paragraph 24 of the Complaint.

29. Defendant denies the allegations set forth in Paragraph 25 of the Complaint.

30. Defendant denies each and every allegation and averment in the Complaint not specifically admitted in this Answer.

31. Defendant controverts and denies that Plaintiff is entitled to judgment or to any relief prayed for in the Complaint, including subparagraphs (A) through (C) of the unnumbered paragraph at the conclusion of the Complaint.

FIRST DEFENSE

32. The Complaint, and each cause of action therein, fails to state a claim upon which relief can be granted.

SECOND DEFENSE

33. Plaintiff's claims are barred, in whole or in part, by the terms and conditions contained in the Agreement.

THIRD DEFENSE

34. Plaintiff's claims are barred, in whole or in part, by the equitable doctrines of waiver, unclean hands, and/or estoppel.

FOURTH DEFENSE

35. Plaintiff's claims (Paragraphs 22(e) and A(5) of the Wherefore Clause of the Declaratory Judgment Count and the Injunction Count) are barred due to a failure to join necessary and indispensable parties. Plaintiff seeks a declaration or injunction from the Court to preclude the City of Cleveland from imposing "stranded costs" and other costs to "mitigate reliability impacts." These costs represent the exiting community's portion of the outstanding balance on the bond issues obtained to finance the capital improvements to the System, for which the exiting community received the benefits during the term of the Agreement, as well as the costs that the City of Cleveland will have to incur to install new water mains, which are

necessary to maintain the same level of service to the surrounding communities. If these costs are not absorbed by the exiting community, the remaining service communities could be saddled with them and/or experience reduced levels of service. As a result, the relief that the City of Westlake is requesting has the potential to significantly impact the other member communities within the System. The City of Westlake, however, has not joined the other member communities to this action.

FIFTH DEFENSE

36. Plaintiff's claims (Paragraphs 22(e) and A(5) of the Wherefore Clause of the Declaratory Judgment Count and the Injunction Count) are barred under the doctrine of separation of powers. Plaintiff seeks a declaration and injunction from the Court to restrain the City of Cleveland from "increasing its water rates" in order to recover "stranded costs" and other costs to "mitigate reliability impacts." At this point, there is no recommendation to increase Westlake's rates or any proposed, pending, or enacted ordinance to increase the rates. Since under Section 112 of the Charter of the City of Cleveland, rates are determined by the Board of Control and subject to the approval of the Council, Plaintiff is thus asking the Court to preclude the Cleveland City Council from enacting an ordinance that would increase the water rates. Ohio courts are clear, however, that under the doctrine of separation of powers, courts "cannot intervene in the process of legislation and enjoin the proceedings of the legislative department of the state." *Pfeifer v. Graves*, 88 Ohio St. 473, 487, 104 N.E. 529 (1913).

SIXTH DEFENSE

37. Paragraphs 22(e) and A(5) of the Wherefore Clause of Plaintiff's Declaratory Judgment Count is barred as it is premature. The Court may only render a declaratory judgment if there is an actual controversy. *Mid-Am. Fire & Cas. Co. v. Heasley*, 113 Ohio St. 3d 133, 136,

2007-Ohio-1248, 863 N.E.2d 142, ¶ 9. Moreover, Ohio case law is clear that courts do not render “advisory opinions.” *Id.* Despite the fact that there is no recommendation to increase the rates nor any proposed, pending, or enacted ordinance to increase Westlake’s rates, Plaintiff is asking the Court to render a declaratory judgment to prevent Cleveland from recovering “stranded costs” and other costs to “mitigate reliability impacts.” As such, Plaintiff’s claims are premature, and Plaintiff merely seeks an advisory opinion.

SEVENTH DEFENSE

38. Plaintiff’s claims are barred by its failure to fulfill one or more conditions precedent under the Agreement.

EIGHTH DEFENSE

39. Plaintiff’s claims are barred because Defendant has fulfilled all of its obligations under the Agreement. In fact, since the City of Westlake signed the Agreement, the City of Cleveland has invested millions of dollars in capital improvements to the System in good faith, going above and beyond its obligations under the Agreement. The City of Westlake has received many benefits from these capital improvements, including expansions to the Crown Water Treatment Facility located in the City of Westlake, which were instrumental in facilitating the economic growth that the City of Westlake has enjoyed over the past twenty years.

NINTH DEFENSE

40. Plaintiff’s claims regarding the Defendant’s rate increases (Paragraphs 22(e) and A(5) of the Wherefore Clause of the Declaratory Judgment Count, the Injunction Count) are barred due to the covenant not to sue contained in the Agreement, which prohibits the City of Westlake from “directly or indirectly, alone or together with others, by courts proceeding or in any other way attempt to obstruct, enjoin, hinder or disable [the City of Cleveland] from setting,

charging, and collecting rates that [the City of Cleveland] in its sole discretion deems necessary to enable [the City of Cleveland] to fulfill its obligations [under the Agreement].” This defense entitles Defendant to reimbursement for all costs, damages and attorney’s fees incurred in defending these claims.

WHEREFORE, Defendant City of Cleveland, Ohio, having fully answered Plaintiff’s Complaint, requests that:

1. Claims against Defendant be dismissed with prejudice;
2. Judgment be entered in Defendant’s favor; and
3. Defendant be awarded its costs, expenses, fees, interest and such other relief as it is entitled.

Respectfully submitted,



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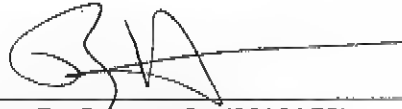
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JURY DEMAND

Defendant City of Cleveland, Ohio demands a trial by jury pursuant to Rule 38 of the Ohio Rules of Civil Procedure on all claims in which a jury is permitted.

Respectfully submitted,



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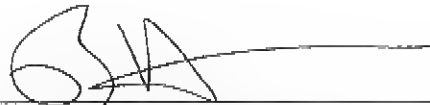
PROOF OF SERVICE

A copy of the foregoing was served on August 2nd, 2012 pursuant to Civ.R. 5(B)(2)(c) by sending it by regular U.S. mail, postage prepaid to the address(es) identified below to:

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